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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 46

EVERETT D. GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER.

GEORGE BLOW,
GEORGE RUBLEE, II,
701 Union Trust Building,
Washington 5, D. C.

CHARLES E. FORD,
401 Third Street, N.W.,
Washington, D. C.,

Counsel for Petitioner by
Appointment in the Courts Below.

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Preliminary Statement

Two decisions of this Court, published after argument was held last term in the present case, raised points of law worthy of consideration in connection with the rehearing of the present case.

The first point of law, raised by *Carroll* v. *United States*, 354 U.S. 394 (1957), is that Congress in conferring appellate jurisdiction over criminal cases in the federal courts did not grant federal appellate courts the power, in derogation of the prevailing state court rule, to require a successful appellant to stand retrial upon an offense greater in degree than that of which he had been convicted. The common law rule prevailing in the states at the time this

jurisdiction was conferred on the federal courts was that a successful appellant, convicted of an offense lesser in degree than that charged in his indictment, could not be retried on that greater offense. Congress has not in subsequent jurisdictional statutes changed the scope of authority originally granted federal appellate courts with respect to ordering new trials. In fact in enacting the Uniform Code of Military Justice Congress reaffirmed its approval of the common law limitations on the scope of a second trial in a criminal case.

Accordingly it would appear that the United States Court of Appeals for the District of Columbia Circuit lacked jurisdictional power to remand Petitioner's case, after his successful appeal from a conviction of second-degree murder, for retrial on the greater offense of first-degree murder. This lack of jurisdiction suggests a basis for reversal independent of the constitutional objection to the second trial on the ground it placed Petitioner twice in jeopardy on the charge of first-degree murder.

The second point of law, raised by *Yates* v. *United States*, 354 U.S. 298 (1957), indicates that the doctrine of collateral estoppel, suitably modified, may be carried over into criminal proceedings to prevent relitigation of an issue of critical fact previously determined in defendant's favor. Thus the verdict of the first jury in the present case which necessarily included a finding that Petitioner had not killed while perpetrating a felony should have precluded consideration of that issue of fact by the second jury, and, since that issue was crucial to the verdict of guilty of murder in the first degree, the trial before the second jury should have been barred.

I.

Congress Has Never Conferred Jurisdiction on a Federal Appellate Court to Require a Successful Appellant To Be Retried for an Offense Greater Than That Embodied in His Conviction.

While Petitioner's prior brief took the position that the principles of *autrefois convict* and *autrefois acquit*, as embedded in the Fifth Amendment, raised a constitutional bar to his second trial on the higher offense on which he had previously been tried but not convicted, this Court's recent decision in *Carroll* v. *United States*, 354 U.S. 394 (1957), suggests that it may be unnecessary to reach the constitutional question in deciding the present case.

Mr. Chief Justice Warren's opinion for a unanimous Court in *Carroll* indicates that the intent of Congress at the time of conferring appellate jurisdiction over criminal cases in the federal courts may well be determinative of the present question. That intent would be disclosed by the state of the law when jurisdiction was conferred.

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction." 354 U.S. at 399.

The Act of February 6, 1889, 25 Stat. 656, which created appellate jurisdiction in federal criminal cases contained

no explicit statement as to the power of an appellate court to direct a new trial when the appeal had been from conviction of an offense lesser in degree than that charged in the original indictment.

> "That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe.
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> * * * * * *
>
> "When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution."

The general grant of power to a federal appellate court to remand for proceedings consistent with its decision should not be interpreted as Congressional disapproval of the majority state court rule then prevailing which limited retrial to that degree of offense of which appellant had been convicted. See cases cited in Appendix A to Petitioner's prior brief.

In *United States* v. *More*, 7 U.S. 159, 172 (1805) it was held that Congressional grants of jurisdiction would be most narrowly interpreted. The Act there construed, 2 Stat. 106, conferred appellate jurisdiction over "any final judgment, order or decree in" the District of Columbia Circuit Court where the matter in dispute exceeded $100. Rejecting

argument that criminal cases could thus be reviewed, Mr. Chief Justice Marshall said:

> "But as the jurisdiction of the [this] court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation; under the constitution, prohibiting the exercise of other powers than those described."

[5] This same caution about expanding its appellate jurisdiction led this Court to distinguish the questions it might review under writ of habeas corpus from questions that were reviewable traditionally by writ of error and hence unreviewable by this Court prior to 1889. *Ex Parte Yarborough*, 110 U.S. 651, 653 (1884). It also led to this Court's refusal to review criminal cases from the lower federal courts by way of certiorari. *Ex Parte Gordon*, 66 U.S. 503, 504-5 (1861).

The Act of March 3, 1891 establishing Circuit Courts of Appeals did not expand the powers of a federal reviewing court but instead conferred jurisdiction to review final lower federal court decisions not reviewable directly by this Court. 26 Stat. 828.

The Act of January 20, 1897 merely amended the Act of March 3, 1891, so as to withdraw review of non-capital cases from this Court and place it in the Circuit Courts of Appeals. 29 Stat. 492. This delegation of appellate power in federal criminal cases to the Circuit Courts of Appeals did not in any way purport to change the scope of power in connection with remands.

Not until the Act of March 3, 1911 was power conferred on this Court to correct lower federal court error in criminal cases by writ of certiorari. Congress in authorizing review and determination by writ of certiorari conferred

on this Court only "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." 36 Stat. 1157. This Act did not enlarge the powers of the Courts of Appeals on remand. 36 Stat. 1133.

From this point on in time the changes in appellate jurisdiction are described in the historical note to 28 U.S.C.A. Sec. 1291. None appear germane to the present question until the advent of the Federal Rules of Criminal Procedure, on March 21, 1946.

Petitioner's position is that the Federal Rules of Criminal Procedure did not expand the powers of an appellate court with respect to the scope of a new trial in a criminal proceeding. Two opinions of this Court, in addition to *Carroll* v. *United States, supra,* are relevant, *Bryan* v. *United States,* 338 U.S. 552 (1950), and *Sapir* v. *United States,* 348 U.S. 373 (1955).

In *Bryan* it is stated that under the Act of March 3, 1891 the Circuit Courts of Appeals were authorized to direct a new trial after reversing a conviction for insufficiency of the evidence to sustain a verdict. 338 U.S. at 555. While this sounds as though Congress in 1891 had authorized a power on remand inconsistent with the common law prohibition against retrial on the greater charge of which appellant had not been convicted, such is not the case. This practice of awarding a new trial where a conviction had been obtained upon insufficient evidence, though but rough justice, nonetheless had strong roots in the common law when the erroneous conviction was for the greatest degree of crime charged. It prevailed in England under the common law prior to 1789. 13 East 416; 4 Blackstone *361. The early common law practice, more appropriate to the present type of situation, would have stopped further proceedings and allowed defendant to seek pardon from

the King. East, *supra*. Another practice that would have been applicable would have been to attaint the jurors and restore defendant to liberty. 3 Blackstone *401-4; 4 Blackstone *361.

The *Bryan* case and the precedents cited therein, however, do not deal with the more subtle and developed rules of common law that applied when the conviction was for a lesser degree of offense than that charged in the indictment. This case indicates that the Congressional grant of power did not change the common law rule.* The *Sapir* case, furthermore, interprets the Federal Rules of Criminal Procedure to grant powers on remand that vary with the intent of the appellant. The rule limiting the scope of a new trial, expressed by the common law courts and advocated in Petitioner's prior brief, rested primarily upon considerations of appellant's intent. The *Sapir* case reaffirms that rule. The common law rule is stated in *Trono* v. *United States*, 199 U.S. 521, 531 (1905): "His application for a correction of the verdict is not to be taken as more extensive than his needs."

One final problem requires disposition. If Petitioner's position on the narrow scope of federal appellate review is correct, a question arises as to the authority of this Court to sustain the conviction in the *Trono* case. That conviction, it will be remembered, was imposed by the Philippine Supreme Court which substituted its judgment for the lesser conviction obtained in the trial court under reviews. The answer to this question is to be found in the

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* It was but five months after the *Bryan* case that Congress specifically reaffirmed the common law rule by enacting the Uniform Code of Military Justice which provided that upon rehearing by court-martial "the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed . . .". Act of May 5, 1950, Art. 63(b), 64 Stat. 127-8.

special grant of jurisdiction in Section 10 of the Act of July 1, 1902 providing for civil government in the Philippine Islands, 32 Stat. 695. As was urged in Petitioner's prior brief very different constitutional considerations are involved by a trial in a federal court within the United States and by a trial in the semi-foreign court in an insular possession. It is not surprising, therefore, that Congress conferred different grants of review power with respect to these very different courts.

It is submitted that, without touching upon the constitutional questions of former jeopardy, the action of the United States Court of Appeals for the District of Columbia in directing and approving the retrial of Petitioner here on an offense for which he had previously been tried and not convicted was beyond the scope of the jurisdiction conferred upon that court by Congress. The conviction obtained at this unauthorized trial should therefore be set aside and further proceedings against Petitioner upon this indictment quashed.

II.

Collateral Estoppel Should Have Barred Relitigating the Issue of Whether Petitioner Had Killed Another While Perpetrating a Felony.

In *Yates* v. *United States*, 354 U.S. 298, 336 (1957) Mr. Justice Harlan for the majority held that a finding in a denaturalization proceeding that petitioner had not advocated violent Communist action prior to 1927 did not collaterally estop a finding in a subsequent Smith Act prosecution of such advocacy after 1927. The majority opinion and also the separate opinions of Justices Black and Douglas indicate, however, that had there been in the earlier proceeding "determinations of fact, and mixed fact and law, that were essential to the decision" showing a lack

of proof of an element of the offense subsequently prosecuted, then collateral estoppel and considerations of former jeopardy would have barred the subsequent prosecution.

Petitioner here was found by the verdict of the first jury guilty of second degree rather than first degree murder. That verdict required as a determination of "mixed fact and law . . . essential to the decision" the finding that Petitioner had not caused death through his perpetration of arson. A contrary finding would have required a verdict of first degree murder. Such a contrary finding was essential to the verdict of the prosecution that Petitioner was guilty of first degree murder. The second jury, however, should have been collaterally estopped from obtaining that determination by the contrary determination essential to the first verdict.

Now two objections may appear to this reasoning. Both of them to be sustained, require violent disregard of the basic fairness that should govern a criminal prosecution.

The first objection requires substituting speculation about the minds of the first jurors for a proper construction of their verdict. It would argue that since the trial judge instructed the jurors that a second degree verdict could be returned if they found Petitioner to have caused death without premeditation, the jurors ignored the trial court's proper instruction on first degree. The first degree instruction told them that they must return a verdict of first degree murder if they found Petitioner had caused death while perpetrating arson.

The argument would proceed, still speculatively, that the basis of the jurors' second-degree verdict was a misinterpretation of the trial court's charge. Presumably that misinterpretation would be that a verdict of second degree was permissible, despite a finding that Petitioner caused death while perpetrating arson, if Petitioner's act was

unpremeditated. This speculation may or may not seem plausible. Nonetheless, it is improper and should not be preferred to a reading of the verdict in the light of a proper interpretation of the judge's instructions.

If an assumption must be made about the minds of jurors, one would have to assume that they correctly rather than incorrectly interpreted the law expounded to them. A correct interpretation of that law would be that the jurors could return a second degree verdict if they found Petitioner had, without premeditation, caused death independently of the commission of arson. In other words, for second degree to be returned, the jurors had to find that Petitioner had not caused death in perpetrating arson.

This distinction was drawn in *Kitchen* v. *United States*, 92 U.S. App. D.C. 382, 205 F.2d 720 (1953), where there was doubt as to whether defendant had, without premeditation, killed and then decided to rob (second degree) or had decided to rob and, without premeditation but during the act of robbing, killed (first degree).

In deciding now what determinations of fact were essential to the verdict of second degree made by the first jury in the present case, it would be presumptuously unfair for an appellate court to assume, solely on the basis of speculation, that those jurors were misinterpreting the instructions of law made to them. In fact, any judicial inquiry as to why those jurors returned that verdict would violate the sanctity of the jury room. The verdict must be given its reasonable and proper interpretation. That necessarily includes a finding that Petitioner did not cause death while perpetrating arson.

Mr. Justice Holmes, delivering the opinion of a unanimous Court in *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), held that such an issue, once determined in the defendant's favor, could not be readjudicated without doing

violence to the fundamental principle of *res judicata*. Mr. Justice Holmes said at page 88:

> ". . . We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.' Hawkins, J., in *The Queen* v. *Miles*, 24 Q.B.D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Commonwealth* v. *Evans*, 101 Massachusetts, 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. *Commonwealth* v. *Ellis*, 160 Massachusetts, 165. *Brittain* v. *Kinnaird*, 1 Brod. & B. 432. Seemingly the same view was taken in *Frank* v. *Mangum*, 237 U.S. 309, 334, as it was also in *Coffey* v. *United States*, 116 U.S. 436, 445.
>
> "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time."

The second objection to collateral estoppel being asserted here would argue that the first verdict was in the same proceeding as the second verdict rather than being in another litigation. It would ignore the facts that the two

verdicts were returned at separate trials held over a year apart and that during the second prosecution Petitioner stood convicted of arson. More fundamentally it ignores the basic purpose of the prohibition against double jeopardy—to prevent multiple prosecutions. Failure to interpose a bar would approve relitigation in a criminal proceeding of an issue of fact previously determined in defendant's favor.

CONCLUSION

For the reasons stated above—namely, that requiring Petitioner to stand a second trial upon an offense for which he had previously been tried and not convicted is beyond the power of a federal appellate court, and that relitigating in that second trial a crucial issue of fact previously found in favor of Petitioner violates principles of collateral estoppel—the judgment of the court below should be set aside and the case remanded for dismissal of further proceedings. This same conclusion would apply should this Court direct a reversal on the constitutional grounds set forth in Section I of Petitioner's prior brief.

In the event that this Court should direct a reversal for the reasons expressed in Sections II or III of Petitioner's prior brief the case should be remanded with appropriate instructions.

Respectfully submitted,

George Blow,
George Rublee, II,
Charles E. Ford,
Counsel for Petitioner by Appointment in the Courts Below.

September 16, 1957